

State Liability

8.1 INTRODUCTION

The French term *responsabilité* covers a number of English-language concepts – ‘liability’ (a duty to pay), ‘responsibility’ (a duty to take charge) and ‘accountability’ (a duty to explain). An action brought by a citizen against the state may be trying to perform one or more of these functions. The notion of *liability* is our primary concern in this chapter: when does the state have to pay a citizen for losses she has incurred as a result of state activity? In order to find the state under a duty to pay, it will be necessary to find that the state should have taken charge of a situation or its consequences. But in many cases, the motivation of the claimant is to make the state explain why harm happened and to apportion blame. This last function is clearly detachable from any claim to compensation and could be carried out by criminal proceedings or by an inquiry. The uses of tort law to perform these different functions differ between England and France. Whereas in England, it is not uncommon that a tort action is seen as almost a proceeding of last resort to force the state to explain how harm occurred,¹ in France, this is more likely to arise in criminal proceedings.² In English law, Dicey noted that trespass actions had an important place in vindicating fundamental rights against infringement by public officials.³ These established liability without proof of loss. In France, the creation of means of redress to challenge the legality of the actions of public authorities made the use of state liability as a vindication of right unnecessary. The French law of state liability is therefore about compensation.

¹ See C. Harlow, *State Liability. Tort Law and Beyond* (Oxford: Oxford University Press, 2004), pp. 49–51.

² Although the scope for these is more limited.

³ The first principle of the rule of law: see A. V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution*, edited by J.W.F. Allison (Oxford: Oxford University Press, 2013), especially p. 188.

There has been a long debate about why the state should have to pay compensation for its activities. The most useful summary is found in the Recommendations of the Council of Europe in 1984:⁴

1. Reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person.
2. Reparation should be ensured if it would be manifestly unjust to allow the injured person alone to bear the damage, having regard to the following circumstances:
 - the act is in the general interest;
 - only one person or a limited number of persons have suffered damage; and
 - the act was exceptional or the damage was an exceptional result of the act.

Those two principles distinguish between fault on the one hand and the collective sharing of losses on the other. As we will see, French administrative law sees both of these issues as part of its law on state liability (*responsabilité de l'administration*). By contrast, English law would see the first principle as concerned with the grounds for *liability*, but the second as concerned with the grounds for *compensation*. Harlow has argued that these two issues should be kept separate, and that tort law should only be concerned with liability. In her view, compensation is a matter for legislative schemes, such as those on vaccine damage, or for non-legal processes, such as *ex gratia* payments.⁵

8.2 THEORIES OF LIABILITY

There has been long debate in France about the basis of state liability. The principle set out in *Blanco* in 1873 is that

Whereas the liability which may be incurred by the state for the loss caused to individuals by the actions of persons whom it employs in the public service cannot be governed by the principles laid down in the Civil Code to regulate the legal relationships of individuals.⁶

⁴ Recommendation no. R (84)15 on Public Liability, adopted by the Council of Ministers of the Council of Europe on 18 September 1984 (Strasbourg 1985).

⁵ Harlow, *State Liability*, pp. 61 and 116–22.

⁶ TC 8 February 1873, *Blanco* no. 00012, D. 1873.3.17, translated by D. Fairgrieve, *State Liability in Tort. A Comparative Law Study* (Oxford: Oxford University Press, 2003), p. 288. For the historical background to this case, see F. Rolin, 'Elle s'appelait Ignacia' RFDA 2021, 413.

The starting point is thus that state liability requires its own justifications. It is not like the liability of a private employer for the harm he causes directly or indirectly through his employees. In the past, as in England in relation to the Crown, the special position of the state acting in the public interest justified an immunity from suit.⁷ But this is no longer considered acceptable. As we will see, there may be some areas of state activity requiring special protection from suit, but these are exceptional and increasingly few in number.

France is unusual in having a completely distinct set of both substantive and procedural rules that govern the liability of public bodies. Countries such as Germany and Italy have common procedural rules and some common substantive rules. The French approach could simply be seen as the effect of path dependency – France started on this route in the seventeenth century if not at the Revolution of 1789 and has just carried on accumulating solutions to problems within this framework. That would not require any deep philosophical justification. But there are at least some philosophical reasons.

If the state is acting in the public interest, one response might be to give it greater protection than is afforded to private individuals who act for their own self-interest. The good motivation of public bodies could justify greater indulgence towards them, especially if the spectre of liability were to make them overcautious. This kind of reasoning is found in the arguments of French scholars and judges, especially when arguing that the state should only be liable where gross fault (*faute lourde*) is proved. On the other hand, the fact that the state is acting for the collective good when a single individual suffers loss could be an argument in favour of the collective sharing of the harm – one individual should not be sacrificed for the good of the whole community. Duguit went so far as to argue that the rationale of state liability was ‘the idea of social insurance provided by the central budget and compensating those who have suffered a loss arising from public services . . . So if the intervention of the State creates a special loss for some people, the Government must compensate it, whether there is a fault of the public officials or not.’⁸ His argument was that, though private law (then) was wedded to subjective fault, fault in public law had long been objective, the failure of a public service to perform its function, and to this were now added liability for risk and for abnormal losses. In his view, ‘the liability of the state can never have any other basis than national solidarity and equality before public burdens.’⁹ In this Duguit

⁷ On the comparative place of state immunity in tort see J. Bell and A. W. Bradley, *Government Liability: A Comparative Study* (London: UKNCCL, 1991), chapter 1.

⁸ L. Duguit, *Traité de droit constitutionnel*, 3rd ed., 4 vols. (Paris: Fontemoing, 1928), vol. 3, pp. 466ff., quoted by R. Errera, ‘The Scope and Meaning of No-Fault Liability’ [1986] *Current Legal Problems* 157, at p. 171. The discussion is already in Duguit’s second edition of 1923 (see note 9), §81.

⁹ L. Duguit, *Traité de droit constitutionnel*, 2nd ed., 4 vols. (Paris: de Boccard, 1923), vol. 3, p. 466.

was following one of the other founders of modern French administrative law, Hauriou. For Hauriou, the foundation (or *cause*) of state liability was the mutual insurance run by the state against administrative accidents. Fault was not the *cause* of the obligation to compensation, but merely one of the conditions that had to be satisfied before an obligation arose; in contemporary terms it was a *fait générateur* (a fact giving rise to liability).¹⁰ Some recent authors would support this approach.¹¹ Most authors do not go so far. English commentators tend to limit the differences between French and English law by emphasising that fault is the primary basis of liability of the state and no-fault liability is an exception.¹² This is stated by many French authors as well.¹³ All the same, Fairgrieve helpfully remarks that ‘French theories all have in common a shift in emphasis from the individual to the collective in bearing the burden of public service activity.’¹⁴ So, whether or not there is one overarching value or several within the rules governing state liability, French administrative law is less concerned with vindicating individual rights than with providing compensation from the community where individuals have suffered from activities undertaken in the public interest.

The presentation here will reflect the two broad categories of fault and no-fault liability found within the Recommendations of the Council of Europe. As Errera pointed out, these two categories often blur into each other.¹⁵ Objective conceptions of fault, a focus on fault of the institution (*faute de service*) rather than of individual civil servants and presumptions of fault draw fault liability away from values of blame and subjective fault. The clear distinction between *liability* and *compensation* for which Harlow argued does not really fit French law, where both fault-based and no-fault-based claims lead to entitlement to reparation from the courts.

8.3 LIABILITY FOR PUBLIC WORKS (*RESPONSABILITÉ POUR LES TRAVAUX PUBLICS*)

As was stated in *Blanco*, the French law on the liability of public authorities is not based on the Civil Code. It is based on principles developed by the courts and on specific rules laid down by statute in relation to specific activities. As

¹⁰ M. Hauriou, ‘Les actions en indemnité contre l’Etat pour les préjudices causés dans l’administration publique’, *RDP* 1896, 51, 53.

¹¹ See the authors cited in Fairgrieve, *State Liability in Tort*, p. 144, note 71.

¹² See Fairgrieve, *State Liability in Tort*, pp. 265–6, Harlow, *State Liability*, p. 60.

¹³ Notably R. Chapus, *Responsabilité publique et responsabilité privée: Les influences réciproques des jurisprudences administrative et judiciaire* (Paris: LGDJ, 1954); see note 25.

¹⁴ Fairgrieve, *State Liability in Tort*, p. 266.

¹⁵ Errera, ‘The Scope and Meaning of No-Fault Liability’, p. 172.

such, the structure is much like English law. The basic ideas were laid down in the Law of 28 pluviôse An VIII (17 February 1800). This was a general law on local government within which the rule on the liability of the local commune for harm caused by public works was laid down. It consolidated and improved previous laws of the Revolution withdrawing competence for litigation in relation to public works from the ordinary courts, giving it to the new *conseils de préfecture*.¹⁶ Although this was a specific law dealing with a specific problem, it summarised principles of liability which had been recognised before the Revolution and it has served as an inspiration for the development by analogy of rules of liability in relation to other activities and other public bodies.

A public work is an immovable object created in the public interest to fulfil a public objective, typically by or on behalf of a public body.¹⁷ The case law drew from the Law of An VIII rules for two types of situation, fault and no fault. Where harm is caused to the participant in the public work – for example, the workman – then proof of fault is necessary. Where harm is caused to the user of the public work, then there is a presumption of fault. The public body is liable unless it can show that it did not commit any fault in the construction or maintenance of the public work. Where harm is caused to a third party – for example, to a neighbour – then the public body is liable without proof of fault. If the harm is permanent – for example, loss of amenity – then the neighbour recovers by showing that the loss is specific to him or a small group and it abnormally exceeds what can be expected between neighbours. If the harm is accidental and temporary, then his loss is covered without needing to show that it is abnormal or special.¹⁸ In cases of no fault, the public body pays unless it shows that harm has resulted from an external cause or from the fault of the victim. In case of fault, the case law adds as exceptions to payment the fault of a third party and the unknown cause (*cas fortuit*). In these provisions, the principles of fault and no-fault liability of public bodies were articulated. In short, the user as beneficiary of a public work has to take some burdens and inconveniences arising from the way it is designed but does not accept fault. By contrast, the neighbour does not accept to suffer an abnormal burden in order to benefit someone else. These principles have been a reference point

¹⁶ See G. Bigot, *Introduction historique au droit administratif depuis 1789* (Paris: Presses Universitaires de France, 2003), paras. 18 and 41.

¹⁷ It can include motorways built and run by private bodies as long as these are part of a public service: TC 8 July 1963, no. 01804, *Société Entreprise Peyrot*, Leb. 787.

¹⁸ On the distinction between accidental and permanent harms, see P. Ferreira in his note to CE 10 April 2019, *Cie nationale du Rhône*, no. 411961, AJDA 2019, 1821.

ever since. In many ways, they resemble the liability for public nuisance in English law.

An example of the interaction of the two bases of liability is the *Syndicat intercommunale* case dealing with the riverbank of rivers in the region between Narbonne and Perpignan.¹⁹ Dykes constructed in the seventeenth century proved inadequate to prevent serious flooding in 1999. In 2006, the prefect ordered the intercommunal board responsible for the maintenance of the dykes to undertake substantial works, changing their level, dredging the river and reinforcing banks. These works proved inadequate to prevent flooding of the neighbouring land of a semi-wild animal reserve in 2011 and 2013. The intercommunal board was found liable to the neighbour. The work on the dykes was undertaken in the public interest by a public body in order to prevent flooding, and so was a public work, even though the dykes themselves belonged to the private owners of the riverbank. The Conseil d'Etat upheld two distinct bases of liability. First, the lower court found the intercommunal board at fault in failing to dredge the existing course of the river, which was still partially blocked with debris, and this fault in maintenance contributed to the flooding. Second, without fault, the work of rebuilding the dykes had left them lower than before and this permanent state of the public work had contributed to the subsequent flooding. But these grounds of liability accounted for only 30 per cent of the loss. The rest was due to natural causes arising from the pre-existing susceptibility of the neighbouring land to flooding. In recent years, injunctions to prevent harm have been awarded along the lines of *quia timet* injunctions in England.²⁰

8.4 FAULT LIABILITY

It is usually stated that the primary liability of the state in France is based on fault: the state acts, but if it acts badly, it pays. This emphasis on fault might give the impression that public law liability, at least in this respect, is similar to private law or English law. But there are significant differences. First, public law fault is essentially institutional fault, a fault of the service (*faute de service*), rather than the fault of individual public servants. Second, the standard of fault is not that of the *bon père de famille*, but a failure to fulfil a mission. That standard is much closer to maladministration as understood by the ombudsman in England. In other respects, it does share much in common with

¹⁹ CE 13 March 2019 *Syndicat intercommunale pour l'aménagement hydraulique du bassin de la Berre et du Rieu*, no. 406867, AJDA 2019, 1243 concl. Dutheillet de Lamothe.

²⁰ CE 18 March 2019, *Commune de Chambéry*, no. 411462, AJDA 2019, 2002 note Ferreira.

French private law, not least in relation to the range of losses which may be compensated and the vagueness of the approach to causation.

8.4.1 *The Nature of Fault*

Fault in public law was developed independently from notions in private law. Deguegue points out that the conception of fault in administrative law has its origins in the liability of the state for failure to maintain public works under the law of 28 pluviôse An VIII (17 February 1800), discussed in Section 3. The public authority was liable either for a failure to construct the public work correctly or for a failure to maintain it.²¹ Liability for other public activities developed by analogy from this, not from a general principle as articulated in art. 1382 (now art. 1240) of the French Civil Code of 1804 and paraphrased by the Conseil constitutionnel decision of 1982.²²

All the same, there are similarities between fault in public and in private law. The classical statement of the meaning of fault in French law was that of Planiol. Planiol wrote in 1905 that fault was a failure to conform to a pre-existing duty established by law, honesty or professional skill.²³ Leading administrative law scholars have taken this to be a common point of reference for both public and private law. Certainly, the Conseil constitutionnel has ruled, 'Considering that, since no one has the right to harm another, in principle every human act which causes loss to another, obliges him by whose fault it occurs to make reparation.'²⁴ Fault liability is thus a general principle of constitutional value applicable to both public and private law. Scholars have noted that, in both public and private law, the courts have been reluctant to identify categories of fault, but rather they assess facts in a holistic way to determine fault. In comparing public law and private law liability, Chapus wrote in 1954 that the approach of civil and administrative judges to determining fault is exactly comparable, for they 'both pay attention very attentively to all the circumstances of the case in order to decide whether there has been a breach of an obligation'.²⁵ In more recent years, scholars in England and France have confirmed this case-by-case approach. Borghetti

²¹ See M. Deguegue, *Jurisprudence et doctrine dans l'élaboration du droit de la responsabilité administrative* (Paris: LGDJ, 1994), pp. 148–59.

²² See note 24.

²³ M. Planiol, 'Études sur la responsabilité civile', *Revue critique de législation et de jurisprudence* 1905, 277.

²⁴ CC decision no. 82-144 DC of 22 October 1982, *Trades Union Immunity*, Rec. 61; J. Bell, *French Constitutional Law* (Oxford: Oxford University Press, 1992), Decision 24.

²⁵ R. Chapus, *Responsabilité publique et responsabilité privée: Les influences réciproques des jurisprudences administrative et judiciaire* (Paris: LGDJ, 1954), p. 357.

suggests that the majority of private law scholars accept the idea that fault is the objective failure to conform to a pre-existing standard.²⁶ But he also notes that the required standards are not set out in any detail and so much of the precision comes from the detailed analysis of the circumstances of each case. Fairgrieve also pointed out that in French administrative law fault requires a detailed focus on the circumstances of the case.²⁷ He helpfully explained that, in English law, the categorisation of types of fault arises because of the importance of the striking-out procedure to defeat claims as a matter of law. By contrast, French decisions will always be based on the facts in the file read as a whole.

Despite these important similarities between fault in private law and fault in administrative law (and, indeed, in English law), there are also important differences. Private law (and indeed the statement of the Conseil constitutionnel) is about protecting rights. If the defendant owes a pre-existing duty, as Planiol held, then it would be correlative to a right in a claimant. But public bodies owe duties to the public in general to carry out the mission they have been given. Jacquemet-Gauché argued that the distinctive feature of French administrative law is that it focuses on the functioning of the administration and so it does not need to ask whether individual rights are affected, as German law does.²⁸ The amorphous concept of *faute de service* suffices and does not require a correlative duty.²⁹ This allows for compensation to be provided for disappointed expectations – for example, when the state fails to provide schooling. Rather than focusing on whether an unlawful act by a public body is a breach of a duty owed to the claimant, the question is rather whether the loss suffered by the claimant is causally connected to the unlawful act of the administration. Despite Planiol, the concept of ‘duty’ is really redundant as it does not feature in the reasoning process of the French administrative courts.

8.4.2 Faute de service

In French public law, fault is defined as the fault of an institution, not of a person. The state is not *vicariously* liable for the acts of its servants, as under

²⁶ J.-S. Borghetti, ‘The Definition of *la faute* in the *Avant-projet de réforme*’, in J. Cartwright, S. Vogenauer and S. Whittaker, eds., *Reforming the French Law of Obligations* (Oxford: Hart, 2009), chapter 12, at pp. 278–9.

²⁷ Fairgrieve *State Liability in Tort*, pp. 125–6.

²⁸ A. Jacquemet-Gauché, *La responsabilité de la puissance publique en France et en Allemagne* (Paris: LGDJ, 2013), p. 481.

²⁹ See B. Delaunay, *La Faute de l’administration* (Paris: LGDJ, 2007), paras. [57]–[59] and at p. 178.

the German Civil Code §839. Rather, it is liable for its own organisational failings, what the English lawyers often describe as ‘non-delegable duties’. Unlike §31 of the German Civil Code, French private law has (at the time of writing) no specific provision on corporate liability for fault, though it has gradually developed the concept through case law.³⁰ Proposed reforms of 2017 would introduce an article in the French Civil Code to this effect. By contrast, French administrative law has long made use of institutional liability as its principal focus. Laferrière wrote in 1887 that ‘The liability of the state is not the liability for others envisaged by article 1242 [former article 1384] Cc, but direct liability: the public service is deemed to be author of the fault; it is it, that is to say the state, which compensates.’³¹

This concept was articulated in *Pelletier* in 1873 to distinguish the jurisdiction of the private law courts from that of the public law courts.³² Following the abolition of the immunity of civil servants from suit in 1870, an action was brought in the civil courts against the military officer in charge of the state of siege of the *département* de l’Oise who confiscated a newspaper. The Tribunal des Conflits held that the action was ill founded because the complaint was simply about an action related to public order without alleging any personal wrongdoing. So the concept started life as a determinant of the *compétence* of the administrative courts – they decided on *faute de service*, rather than the personal wrongs committed by public officials against members of the public.

The key feature about the idea of *faute de service* is that it is not necessary to identify any specific public official who has committed a wrong before the state is liable. It is sufficient that the state organisation is responsible for the act in question. This was clarified in *Feutry* in 1908.³³ In this case, a mentally handicapped adult escaped from an asylum run by the *département* of Oise and set fire to hayricks of a neighbouring farmer. No fault on the part of any of the asylum staff was alleged, but the case was still held to fall within the functioning of the public service for which the *département* was liable under public law.

‘Fault’ in the service does not necessarily mean that there is a fault committed by the administration, but merely a fault for which it is responsible. For

³⁰ G. Viney, P. Jourdain and S. Carval, *Traité de droit civil : Les conditions de la responsabilité*, 4th ed. (Paris: LGDJ, 2013), para. 854, citing ‘a legal person answers for the faults for which it is made liable by its organs without it being necessary to show that it is liable under art. [1242] para. 5 [of the Civil Code] for the organs as its employees’ (Cass. 2^e civ., 17 July 1967, Bulletin civil II, no. 261, p. 182; obs. Durry, *Revue trimestrielle de droit civil* 1968, 149).

³¹ E. Laferrière, *Traité de la juridiction administrative et des recours contentieux* (Paris: Berger-Levrault, 1887), vol. 2, 178.

³² TC 30 July 1873, *Pelletier*, no. 00035, D. 1874.3.5 concl. David.

³³ TC 29 February 1908, *Feutry*, no. 00624, D. 1908, 349 concl. Teissier.

example, the state was held responsible where the school bursar was subjected to bullying by administrative and teaching staff in her school.³⁴ In this case, legislation provided that no civil servant should suffer repeated bullying, and this gave rise to state liability without her having to prove fault in allowing the bullying to occur.

8.4.3 Faute personnelle

The principle established in *Pelletier* is that claims based on the personal fault of a civil servant or official should be brought in the ordinary courts. Of course, this is unattractive since the individual rarely has the funds to satisfy a judgment. An argument that the claimant's harm resulted from the personal fault of a civil servant or official will be made by the state either as a defence to a claim by the victim or a reason for disciplining the author of the harm. The difficulty in distinguishing *faute personnelle* from *faute de service* is similar to the attempts by English employers to show that they are not vicariously liable for harm caused by their employee.

The classic example of the reluctance of French administrative courts to accept that a fault is purely personal is *Anguet*.³⁵ Here a customer arrived at a Parisian post office in the evening to cash a money order. When he wanted to leave, he found that the public exit was already shut. An official directed him to leave by a passageway normally reserved for post office employees. Two employees seeing him leaving mistook him for a wrongdoer and pushed him so forcefully out of the post office and into the street that he fell and broke his leg. Although the Minister of Posts and Telegraph claimed that this was a purely personal fault of the employees, the Conseil d'Etat found that their actions resulted from the poor performance of the public service and so the state remained liable to compensate Mr Anguet. Despite the view of scholarly writing at the time, the Conseil decided that it was possible for there to be a cumulation (*cumul*) of the *faute personnelle* of the state employees and the *faute de service* of the organisation – two distinct faults leading to a single loss. This was taken further in *Epoux Lemonnier*.³⁶ The commune of Roquecourbe held its annual fête and included a shooting range with targets floating on the river. A bullet from one of the guns struck Mme Lemonnier as she and her husband were walking along the footpath along the river. The bullet lodged in her spine and pharynx. Initially, the Lemonniers sued the commune in the

³⁴ CE 28 June 2019, no. 415863.

³⁵ CE 3 February 1911, *Anguet*, no. 34922, S 1911.3.37 note Hauriou.

³⁶ CE 26 July 1918, *Epoux Lemonnier*, no. 49595, S 1918–19.3.41 concl. Blum, note Hauriou.

civil courts and the claim was rejected at first instance based on *Feutry*. They then asked the commune for compensation and, on its refusal, they brought a claim before the Conseil d'Etat. In the meantime, their appeal of the civil judgment was heard by the *cour d'appel* of Toulouse, which awarded them damages against the mayor for his personal fault in organising the shooting range. Notwithstanding this, the Conseil d'Etat awarded them damages for a *faute de service* by the commune. The fact of the civil judgment did not deprive them of their right to compensation for a fault in the management of a public service and the appropriate measure of damages for that (which might be different from the amount found by the civil court). Here the same fault could be seen as both a *faute personnelle* and a *faute de service*. The two judgments were distinct, but the public authority was then subrogated to the claimants and could obtain reimbursement from the mayor as awarded by the civil court.

In both *Anguet* and *Lemonnier*, the acts of the officials were clearly within their public roles as employees or mayor. The Conseil d'Etat went further in *Mimeur, Defaux et Besthelsemer* to find that there might be state liability even where the state employees were acting contrary to their official duty.³⁷ In each of the three cases under consideration, road accidents were caused by officials using official cars for private journeys. For example, in *Mimeur*, a soldier driving a petrol tanker made a detour to his home village and crashed into the wall of the claimants' house. The claimants in the cases were able to recover. The *commissaire du gouvernement* Gazier noted that private law held the keeper of a car liable for the unauthorised journeys of the driver and administrative law needed to follow suit. Accordingly, the Conseil d'Etat held that the accidents had resulted from vehicles entrusted to drivers for the performance of a public service and, on the facts of each case, the accident could not be considered without any link to the service in question.³⁸ This case law continues to apply. For example, the commune of Saint-Paul was held liable for a mayor who used his office to issue false documents recognising debts owed by the commune which were used as evidence of solvency of a company by the claimant bank.³⁹

Where there has been a personal fault of a public official, the question arises whether a contribution can be expected from the official. In *Laruelle*, a soldier took away an army vehicle without authorisation for a private journey in the

³⁷ CE 18 November 1949, *Mimeur, Defaux et Besthelsemer*, no. 91864, JCP 1950.II.5286 concl. Gazier.

³⁸ Litigation in relation to road accidents caused by public service vehicles was moved to the civil courts by the Law of 31 December 1957 and is now governed by the Law of 5 July 1985.

³⁹ CE 2 March 2007, *Société Banque française commerciale de l'Océan Indien*, no. 283257.

course of which he knocked down a pedestrian.⁴⁰ The pedestrian successfully sued the state. The Conseil d'Etat found that there was inadequate supervision in the garage which had allowed Laruelle to remove the vehicle, and this amounted to a *faute de service*. The administration paid the victim but then issued an order to pay a contribution for the whole amount from the soldier, which he challenged. The Conseil d'Etat upheld the contribution claim because the harm had been caused by personal fault. In *Delville*, a civil court awarded damages against a government lorry driver who injured a third party whilst drunk. He sought to recover the damages from the state on the ground that the accident was caused by defective brakes on the lorry. The Conseil d'Etat upheld his claim to a 50 per cent contribution by the state. Thus the decision in the two cases established the right of the state to seek contribution from a public employee to the extent that their personal fault had caused the harm to the victim.

The scope of this principle was set out in *Papon* in 2002.⁴¹ In this case, a Vichy official was convicted in 1998 of crimes against humanity in ordering the arrest and detention of Jews between 1942 and 1944 whilst he was the secretary general of the *département* of Gironde. Apart from a lengthy prison sentence, the *cour d'assises* ordered him to pay a sum of €720,000 in costs and damages to relatives of his victims. He sought reimbursement by the state on the ground that his acts were undertaken in his official capacity. The Conseil d'Etat found that, notwithstanding the declaration of the unlawfulness and nullity of the acts of the Vichy regime made at the Liberation, the policies and decisions in question were a fault on the part of the state. It then was a question of determining the appropriate portion that the state should bear and the Conseil d'Etat decided that this was half the amount of damages ordered by the criminal court, because his eagerness to have Jews detained went beyond what was required of him as an official at the time. The decision sets out clearly three possible situations. In the first, the harm for which the public official has been sanctioned in the civil court is wholly attributable to a *faute de service*. Here the official is entitled to a full reimbursement from the state. In a second situation, the harm results exclusively from a personal fault of the official which is separable from the performance of his functions. In such a case, the official cannot obtain any reimbursement for the damages awarded against him because there is no *faute de service* committed by the administration. In a third situation, like in *Papon* or *Delville*, the harm is caused both by a personal fault and by a *faute de service*. Here the victim can seek redress for

⁴⁰ CE Ass. 28 July 1951, *Laruelle and Delville*, no. 04032, Leb. 464.

⁴¹ CE Ass. 12 April 2002, *Papon*, no. 238689, Leb. 139 concl. Boissard.

the totality of the harm done either from the administration or from the individual. Where the official pays, the administration is only obliged to reimburse him for that part of the harm attributable to the *faute de service* and this is a matter of assessment by the administrative court in the light of the seriousness of the respective faults of the service and the official.

8.4.4 Faute simple and Faute lourde

Laferrière, the father of modern French administrative law, wrote in 1887 that article 1240 (former article 1382) of the Civil Code did not apply in administrative law. On the one hand, it was too broad since the state is not liable to compensate for every act of fault, and on the other, the state can be liable to compensate without fault.⁴² The first of those two exceptions related to the rules requiring proof of gross fault (*faute lourde*) for a significant number of state activities. *Faute lourde* is not necessarily a standard of liability that is prejudicial to the victim. The authors of the *Grands Arrêts* argue that the use of this standard has permitted the courts to remove many activities from a previous total immunity whilst being able to balance the needs of the service and the interests of users of a service.⁴³ It constitutes a halfway house between total immunity and total liability for fault.

In the course of the twentieth century, there was a gradual decline in the number of areas in which *faute lourde* is required to establish liability. In particular, the areas in which the state is only liable for *faute lourde* (gross negligence) have diminished: hospitals, prisons and public order activities have all moved to *faute simple*. As late as 1954, Chapus noted that there were two areas in which ordinary fault had been heightened to *faute lourde*: where a service was gratuitous (gratuitous passenger or a beneficiary of a public service) and difficult activities, especially medical cases, recovery of taxes and supervision of others (particularly the mentally ill).⁴⁴ Chapus already identified that the *faute lourde* requirement was out of line with the current climate of wishing to compensate victims as much as possible.⁴⁵ Consequently in 1992, the Conseil d'Etat in *Époux V* abandoned the restriction of hospital liability to *faute lourde*.⁴⁶ For a long time, the administrative courts had distinguished between medical treatment and hospital care. Public hospitals were liable for ordinary fault (*faute simple*) where they were careless in looking

⁴² Laferrière, *Traité de la juridiction administrative*, vol. 2, p. 176.

⁴³ *Grands Arrêts*, 22nd ed. 2019, p. 636.

⁴⁴ Chapus, *Responsabilité publique et responsabilité privée*, pp. 360–6.

⁴⁵ *Ibid.*, p. 371.

⁴⁶ CE Ass. 10 April 1992, no. 79027, Leb. 171, concl Legal.

after a patient. But in the case of medical interventions such as operations or prescribing drugs, they were liable only in the case of gross fault (*faute lourde*). In this case, a woman had a caesarean operation in which the risks of hypertension and cardiac problems were known. She was given an excessive dose of a drug which caused hypertension and a cardiac arrest. Fortunately, another hospital saved her life, but she was left with severe after-effects. The *commissaire du gouvernement* argued that the distinction between those medical treatments subject to requirements of *faute lourde* and those for which *faute simple* sufficed was incoherent. The Conseil d'Etat followed, noting the facts and holding that they 'constitute a medical fault of a kind giving rise to the liability of the hospital'. This approach was enacted in art. 1142–1 of the Code of Public Health from 2002.⁴⁷ The approach was also followed in relation to emergency medical treatment.⁴⁸ In prisons, immunity was replaced in 1958 by *faute lourde* and then by *faute simple* in 2007.⁴⁹ Public regulation and safety (*police* in the French meaning) was immune from liability until 1905, then replaced by *faute lourde*. Now emergency services are liable merely for *faute simple*, despite the difficulty of the task.⁵⁰ More significant, in the *Napol* case in 2016, the Conseil d'Etat gave the advice that prefects issuing search warrants in hot pursuit of terrorists would be liable for ordinary and not gross fault.⁵¹ The regulation of dangerous premises, phytosanitary measures and the urgent removal of driving licences all now give rise to liability where there has been simple fault.⁵² Equally, tax authorities protected by immunity until 1962, then subjected to liability only for *faute lourde* until this was all replaced by *faute simple* in 2011 in the *Krupa* case.⁵³

Frier and Petit comment that 'without being totally abandoned [*faute lourde*] tends to retreat before the increasingly strong requirements of social solidarity'.⁵⁴ Three areas in particular seem resistant to this trend of abandoning the requirement of *faute lourde*: judicial decisions, internal security and regulatory authorities. The main area for *faute lourde* is shared with private

⁴⁷ Law 2002–303 of 4 March 2002.

⁴⁸ CE Sect. 20 June 1997, *Theux*, no. 139495, Leb. 254 concl. Stahl.

⁴⁹ CE 9 July 2007, *MD*, no. 281205, AJDA 2007, 2094 note Arbousset.

⁵⁰ CE 29 April 1998, *Commune de Hannapes*, no. 164012, Leb. 185 (fire services); CE Sect. 13 March 1998, *Améon*, no. 89370, Leb. 82 (sea rescue).

⁵¹ CE Ass. 6 July 2016, *Société Napol et autres*, no. 398234, Leb. 320 concl. Bourgeois-Machureau; AJDA 2016, 1635.

⁵² See respectively, CE 27 September 2006, *Commune de Baalon*, no. 284002, AJDA 2007, 385 note Lemaire; CE 7 August 2008, *Ministre de l'agriculture et de la pêche*, no. 278624, AJDA 2008, 1572; and CE 2 February 2011, *M Gérard A*, no. 327760, RFDA 2011, 451.

⁵³ CE Sect. 21 March 2011, *M Christian Krupa*, no. 306225, AJDA 2011, 1278 note Barque.

⁵⁴ L. Frier and J. Petit, *Droit administratif*, 10th ed. (Paris: LGDJ, 2018), para. [958].

law – the operation of the justice system. The Law of 5 July 1972 (art. L141-1 Code de l'organisation judiciaire) imposes liability of the state for '*faute lourde* or *déni de justice*'. Although not directly applicable to administrative law, the Conseil d'Etat followed suit in *Darmont* in 1978, reversing a decision in 1969 setting out the immunity of the state for judicial decisions.⁵⁵ But, when the state is sued for excessive delay in dealing with a case in breach of art. 6 (1) of the European Convention on Human Rights, liability is based on ordinary fault. Thus, in *Magiera*, the proceedings at first instance were allowed to drag on for seven years and six months with the expert's report alone taking four years and four months to be produced.⁵⁶ The Conseil d'Etat followed the lower courts in finding this an excessive delay. Basing itself both on art. 6 (1) and on 'the general principles governing administrative justice', it found that litigants had the right to have their case decided in a reasonable time. The calculation of the reasonable time is assessed through a holistic view of the proceedings. Litigation on this matter is brought normally directly before the Conseil d'Etat under art. R311-1 5° of the CJA. But the complexity of the split between public and private law can lead to the Tribunal des Conflits judging the case. For example, in a case in 2019,⁵⁷ the Tribunal decided that a case involving the dismissal of an employee which had taken nine and a half years was excessively delayed and non-pecuniary loss of €7,500 was awarded. Here, the dismissal action against the employer lay before the *tribunal des prud'hommes*, but the challenge to the refusal by the labour inspector to permit the dismissal of a protected employee lay before the administrative courts. The case involved two decisions at first instance, three in appeal courts, two in the Cour de cassation before the parties eventually settled, and the damages claim against the state was brought to a further court of first instance and the Tribunal des Conflits!

More recently, Wachsmann has argued that the requirement of *faute lourde* has unjustifiably been retained in cases such as terrorist surveillance.⁵⁸ Since *Epoux V* and *Napol*, major bastions of this requirement had crumbled. He considered it a legacy of the ancient immunity of the state amounting to a denial of justice in the modern era. For him, the difficulty for the administration in undertaking a task can be handled within the idea of fault without resorting to requiring proof of *faute lourde*.

⁵⁵ CE Ass. 29 December 1978, *Darmont*, no. 96004, Leb. 542, reversing CE Ass. 12 July 1969, *L'Etang*, no. 72480, Leb. 388.

⁵⁶ CE Ass. 28 June 2002, *Garde des Sceaux c Magiera*, no. 239575, Leb. 248, concl. Lamy.

⁵⁷ TC 9 December 2019, *C*, no. C4106, AJDA 2020, 1186.

⁵⁸ P. Wachsmann, 'A quoi sert la faute lourde en matière de police administrative?', AJDA 2018, 1801.

In the cases Wachsmann criticised, it was held that public authorities exercising surveillance of terrorist suspects would only be liable for gross fault for failing to prevent the harm the suspects caused to the claimants. Traditionally liability to third parties for policing responses to terrorism has been based on *faute lourde*.⁵⁹ This was applied in two cases in 2018. In one case, relatives of those killed by terrorists at the Bataclan nightclub in 2015 sued the security services for failing to apprehend the killers based on information available to them. The tribunal administratif of Paris rejected the claim on the ground that no *faute lourde* had been alleged against the services.⁶⁰ The terrorist plans were conceived outside France and the terrorists were only in France for a short period before the attack. In a case before the Conseil d'Etat, *Chennouf*, the family of a victim of a terrorist killings in Nice sued the state for failures of the security services in monitoring Merah, a suspect whom the services failed to follow up.⁶¹ It was held that there was no *faute lourde* and so no liability. In this case, the Minister of the Interior himself admitted mistakes, so it was hard to see why there was no liability. It is possible that the problem of the secrecy of security information would make it impossible for documents to be released to the court.

8.4.5 Fault and Unlawfulness

Until the 1970s, there was a debate in France about whether an unlawful decision was necessarily a fault giving rise to liability. But that was resolved by the Conseil d'Etat in *Ville de Paris c Driancourt*.⁶² In that case, the police commissioner banned the use of gaming machines in a posh part of Paris as a result of complaints from the residents' association. That decision was annulled subsequently by the *tribunal administratif* of Paris which awarded the owner of the premises 85,745F in damages. The decision was upheld by the Conseil d'Etat, which held that 'unlawfulness, even if it is attributable to a mere error of assessment, constitutes a fault which is capable of giving rise to the liability of public authorities'. In the view of the *commissaire du gouvernement* Gentot, 'subjects have a genuine right to legality and can claim damages

⁵⁹ CE 22 October 1975, *Bergon*, no. 92865, Leb. 521: a traffic accident resulting from tear gas fired onto the highway during May 1968 riots.

⁶⁰ TA Paris 18 July 2018, V,W,X, no. 16121238/3-1 AJDA 2019, 130 note Blandin.

⁶¹ CE 18 July 2018, *Chennouf*, n° 411156, AJDA 2018, 1915 concl. Marion. The commentary notes that liability for the failure of the security services to stop children joining jihadists abroad has been held to be based on *faute simple*: CE 9 Dec 2016, n° 386817, AJDA 2016, 332 concl. Domino; CE 26 April 2017, n° 394615, AJDA 2017, 1469 concl. Domino.

⁶² CE Sect. 26 January 1973, no. 84768, Leb. 78 concl. Gentot, translated in Fairgrieve, *State Liability in Tort*, pp. 297-8.

for the harmful consequences of the breach of this right'. This point was reinforced by an *avis* of the Conseil d'Etat in 2016, *Société Napol*.⁶³ The question in this case was liability for illegal searches undertaken within the state of emergency declared following the terrorist attacks at Bataclan and other locations in Paris in November 2015. On subsequent days, prefects ordered searches of private accommodation under powers granted under the Law of 3 April 1955. In a decision in February 2016, the Conseil constitutionnel ruled that search warrants had to be accompanied by reasons.⁶⁴ Those subject to searches sought the nullity of the warrants for lack of reasons and damages. The Conseil d'Etat responded to a request for an opinion by the *tribunal administratif* of Cergy-Pontoise that 'any illegality affecting a decision ordering a search amounts to a fault capable of giving rise to the liability of the state'. But, as Fairgrieve had already pointed out, the extent of this scope for liability is limited by the requirements of causation – that is, the cause of illegality in the present case. In particular, the Conseil d'Etat noted 'the direct character of the causal link between the illegality committed and the alleged harm cannot be established where the decision ordering the search is only vitiated by an irregularity in formality or procedure and where the court considers, in the light of all the facts presented to it by the parties, that the decision ordering the search could have been taken legally by the administrative authority in the light of the facts available to it at the time the search was authorised'. This follows established case law which refuses compensation when the court considers that the administration could have taken the same decision lawfully at the time and so the illegality has had no real impact on the situation of the citizen.⁶⁵

A particularly important area of unlawfulness is the incompatibility of legislation and judicial decisions with EU law. In *Gestas*, despite its reluctance to allow to use a damages action as a means to remake a final judgment, the Conseil d'Etat held that 'the liability of the state can be found where the content of a court judgment is affected by a manifest breach of community law having as its purpose the conferral of rights on individuals'.⁶⁶ But that was not

⁶³ CE Ass. 6 July 2016, *Société Napol et autres*, no. 398234, Leb. 320 concl. Bourgeois-Machureau; AJDA 2016, 1635.

⁶⁴ CC decision no. 2016-536 QPC of 19 February 2016, *Ligue des droit de l'homme*, ECLI: FR:CC:2016:2016.536.QPC.

⁶⁵ See CE Sect. 19 June 1981, *Carliez*, no. 20619, Leb. 274 concl. Genevois; Fairgrieve, *State Liability in Tort*, pp. 184–5. On the importance of causation generally, see C. Malverti and C. Beaufils, 'Les causes perdus' AJDA 2021, 966.

⁶⁶ CE 18 June 2008, *Gestas*, no. 295831, Leb. 230. The claimant teacher did, however, recover €14,000 in damages for the delay in dealing with his challenge to a civil service employment decision taken against him, which had taken fifteen years and eight months to decide. TA Paris, 21 April 2021, no. 1823994/2-2, AJDA 2021, 1345.

found in that case, nor in *Lectalis Ingredients*.⁶⁷ It is to be noted that, in these cases, liability of courts is grounded on gross fault (*faute lourde*). This standard matches the requirements of EU law that the state is responsible for sufficiently serious breaches of EU law by its courts.⁶⁸

8.4.6 Fault in Regulation

Fault in regulation (supervision and control) is controversial in all countries. When a citizen sues the state for the failure to regulate a private body, she is effectively making the state a guarantor of the good behaviour of a private person and is usually suing for a failure to act to prevent harm being caused, rather than for a positive act done by the regulatory body. The problem in France is similar to that in England as it may entail a risk of disempowerment.⁶⁹ After the Liberation in 1944, the liability of state regulatory or supervisory bodies was established on the basis of *faute lourde*. The justification lay in the particular difficulties of the task.⁷⁰ For example, in the supervision of banks, *faute lourde* is required before the supervisory body was liable, even if there irregularities in the information provided by the bank over several years and criminal offences were being committed by its directors.⁷¹ This line of case law was maintained in *Kechichian*.⁷² The Conseil d'Etat rejected the ruling by the lower court that a finding of liability could be based on simple fault, but found gross fault on the facts. In this case, depositors claimed that the Commission Bancaire had committed fault in supervising a Saudi-Lebanese bank. An inspector's report to the Commission that the Bank needed urgently to make provision against large unpaid debts, but it noted the goodwill of the managers. In view of all the facts, gross fault was found on the part of the Commission Bancaire in following up the inspector's report. It had delayed too long in ensuring that the finances of the bank were secured, and it had not acted in accordance with prudential principles in ensuring sufficient funds were held by the bank.

⁶⁷ CE 9 October 2020, *Lectalis Ingredients SNC*, no. 414423, AJDA 2020, 1935, but was found by a lower court in a case involving an erroneous decision by the Conseil d'Etat.

⁶⁸ Case C-224/01, *Köbler v Austria*, ECLI:EU:C:2003:513 [51]–[59].

⁶⁹ See generally M. Andenas and D. Fairgrieve, "To Supervise or to Compensate?", in M. Andenas and D. Fairgrieve, eds., *Judicial Review in International Perspective. Liber Amicorum for Lord Slynn of Hadley* (The Hague: Kluwer, 2000), chapter 24.

⁷⁰ See Deguergue, *Jurisprudence et doctrine*, pp. 231ff.

⁷¹ See CAA Lyon, 28 December 1990, *Fauvy*, no. 89LY01299.

⁷² CE Ass. 30 November 2001, *Kechichian*, no. 219562, AJDA 2002, 136, translated in Fairgrieve, *State Liability in Tort*, pp. 321–3.

A similar approach was adopted in relation to the supervisory role of the prefect in referring actions of a public authority to the administrative courts.⁷³

8.4.7 *Types of Fault*

Fault may take various forms. The first is the *failure to provide a public service*. For example, the law provides that the state has a duty to provide education for a handicapped child that is appropriate to his or her needs. Where the state had failed to provide such education for a handicapped girl, it was held liable to her. The duty was not one of best efforts and the state could not escape liability by claiming that there were no available facilities for her.⁷⁴ Similarly, where the state was unable to provide all the teaching on its prescribed curriculum throughout an academic year because of insufficient staff, the father of the child was able to obtain damages for the disruption to his child's schooling.⁷⁵ This is the equivalent of a breach of a statutory duty.

Fault may occur in the *performance of a perfectly lawful and careful policy*. Thus, in *Blanco*, the girl was injured by the careless use of a public service cart from a tobacco factory.⁷⁶ Similarly, in *MD*, there was a policy on the frequency of checks by prison officers on vulnerable prisoners.⁷⁷ In this case, a routine check was not carried out, which permitted a young offender to commit suicide.

Fault may occur not only by action but also by inaction. This is shown in the case of precautions with regard to health, especially in the medical case *M.D.*⁷⁸ Here, the risk of transmission of HIV through contaminated blood transfusions was only established scientifically in November 1983. Already in June 1983, the Minister of Health issued a circular warning of the suspicion of such transmission. The effectiveness of heating blood to deal with this risk was proved scientifically in October 1984 and this was communicated to the administration in a scientific report in November 1984. Advice on using this treatment through products, readily available internationally, was not disseminated until a ministerial circular of October 1985. The failure of the Minister to act

⁷³ CE 6 October 2000, *Ministre de l'Intérieur c Commune de St-Florent*, no. 205959, Leb. 395.

⁷⁴ CE 8 April 2009, *Laruelle*, no. 311434, AJDA 2009, 1262 concl. Keller. The principles were reaffirmed in CE 8 November 2019, *BA*, no. 412440, AJDA 2020, 1109, but no liability was found on the facts.

⁷⁵ CE 27 January 1988, *Giraud*, no. 64076, Leb. 39, translated in Fairgrieve, *State Liability in Tort*, p. 303. Only 1,000 F (about €150) was awarded for the loss of seven hours of teaching a week.

⁷⁶ See note 1.

⁷⁷ See note 48.

⁷⁸ CE Ass. 9 April 1993, *M.D.*, no. 138653, AJDA 1993, 344; D. 1993, 312 concl. Legal.

promptly in preventing the possibility of infection led to the state being found liable for fault to all those harmed by infected blood between November 1984, when the Minister should have acted, and October 1985, when action was finally taken. On the criminal side, both the Prime Minister and the Minister were found not guilty ten years later, confirming the statement of the Minister in which she had said she felt ‘responsible but not guilty’, an assessment badly received by the public as the symbol of non-accountability of politicians. The first issue is thus whether the risk to health was known. For example, in *Cohen*, there was no-fault liability for harm caused to a surgeon treating a patient with infected blood in May 1983.⁷⁹ The second issue is whether there are means of avoiding the risk. The third issue is whether the state failed in adopting those means. The existence of such means and the failure to act promptly to ensure they were adopted led the Conseil d’Etat to find the state liable for fault in the medical case, *M.D.* Where the risk was not known or could not be prevented, the state may still be liable, but only on the basis of no-fault, as was the case in *Cohen* where the risk of contracting HIV during surgery was considered abnormal in that public service.

8.5 NO-FAULT LIABILITY

No-fault liability of the state predates the Revolution. The idea of compensation for actions taken to protect the community, such as demolishing buildings in the path of a fire, and for actions to help the community, such as the billeting of troops or the expropriation of property for defences, goes back to medieval times.⁸⁰ The underlying principle is that burdens borne for the common good should be shared. It is conventional in France to distinguish between liability for risk and the principle of equality before public burdens. That will be followed here, though the two are fundamentally connected.

8.5.1 *Liability for Exceptional Risks*

At the end of the nineteenth century, no-fault liability was introduced into public and private law on the basis of risk. But, as the idea of Hauriou cited earlier made clear, the fundamental justification was social solidarity and that

⁷⁹ CE 10 October 2003, *Cohen*, no. 197826, AJDA 2003, 2390 concl. Chauvaux, note Deguegue. The case is a good example of the division of responsibilities between public and private law. The surgeon’s loss of earnings was a matter for social security law and thus for the ordinary courts. The claims of his children as ricochet victims was for public law.

⁸⁰ J.-L. Mestre, *Introduction historique au droit administratif français* (Paris: Presses Universitaires de France, 1985), pp. 28–32, 137–40.

is directly connected to the principle of equality before public burdens.⁸¹ This is even more the case today when the idea of liability for risk has gone out of fashion in France.⁸²

The classic example of liability for exceptional risk is *Regnault-Desroziers*.⁸³ From 1915 a large quantity of grenades was stored in a fort to the north of Paris, close to a heavily populated area. In March 1916, there was a huge explosion in the fort, killing fourteen soldiers and nineteen civilians and injuring eighty-one others. It was found that the army had placed this large cache of weapons destined for the Front against the Germans without undertaking the precautions necessary to avoid harm to neighbours. Whereas the *commissaire du gouvernement* Corneille argued for liability based on fault, the Conseil d'Etat preferred to base its decision in favour of the victims on no fault. In its view, the operations, undertaken under the pressure of military necessity, 'involved risks exceeding those which normally apply to a neighbourhood, and . . . such risks were capable of incurring the liability of the state without [proof of] fault'.⁸⁴ The principle applied here of no-fault liability for harm exceeding the normal inconveniences between neighbours had previously only applied to public works, as explained in Section 3. The decision broadened the scope of liability beyond public works. Subsequent decisions stressed the importance of the dangerousness of the public work in that it justifies compensating not only third parties to the public service, but users as well. Thus, in *Dalleau*, there was a rock fall onto a road which damaged the claimant's car and injured himself and his passenger; the state was held liable to compensate him.⁸⁵ The risk of landslips in that part of the island of Réunion had been increased by cutting down trees in order to construct the road and several had occurred since it was built. The exceptional dangerousness of the public work justified a finding of liability without fault in favour of a user of the road and without proof of a defect in design or maintenance. However, a few years later, due to improvements of the prevention of rocks falling, the Conseil d'Etat ruled that the presumption of fault should apply again to users of this road and no other example of no fault in case of users of public works had been found since then. The road should be soon closed once the *autoroute de la mer*, an artificial road seven miles long, is built to the sea.

⁸¹ See note 10.

⁸² See G. Viney, P. Jourdain and S. Carval, *Traité de droit civil. Les conditions de la responsabilité*, 4th ed. (Paris: LGDJ, 2013), para. 854.

⁸³ CE 28 March 1919, *Regnault-Desroziers*, no. 62273, S. 1918–19, 3, 25 note Hauriou.

⁸⁴ Translation by Fairgrieve, *State Liability in Tort*, p. 293.

⁸⁵ CE Ass. 6 July 1973, *Ministre de l'équipement et logement c Dalleau*, no. 82406, Leb. 482.

This ground of liability was expanded beyond harm in a neighbourhood to dangerous activities in general. So, in *Lecomte* a bar owner sitting in his doorway was shot by a municipal police officer in an operation trying to stop a car which contained suspects.⁸⁶ Whereas, because of the special difficulty of policing, the City of Paris would only have been liable for *faute lourde*, the Conseil d'Etat held that the state would be liable without proof of fault for the use of firearms. The exceptional risk of harm by ricochet bullets here exceeded the ordinary risks of life an individual would expect to bear. Similarly, the husband of Mme Daramy was able to recover for her death caused by bullets fired by a municipal police officer who was chasing men who had knifed a taxi driver.⁸⁷ As the authors of the *Grands Arrêts* point out, this decision talks about risk, but also relies on the abnormal character of the harm, which typically is a feature of liability for equality before public burdens.⁸⁸ So the case shows how the two bases of no-fault liability are connected where the harm is to third parties to a public service. The pattern of liability is repeated in numerous other cases. For example, in *Sadoudi*, the family of a claimant was able to recover when a policeman's service revolver went off accidentally, killing his flatmate.⁸⁹ The risk to the public of the obligation to keep his service revolver at home justified the liability of the police authority. Indeed, subsequent cases such as *Napol* invoke equality before public burdens in order to provide a remedy to third parties (such as neighbours) who suffer harm as a result of lawful police searches.⁹⁰

The debate about whether risk is a determinant part of the justification for liability has become more acute in relation to liability for the acts of those whom the state controls or supervises. An *ordonnance* of 1945 replaced imprisonment for juvenile offenders with a more liberal institution where offenders lived under supervision but could more easily escape. In *Thouzellier*, several inmates of such a re-education centre and committed burglary in the claimant's villa.⁹¹ He successfully sued. The Conseil d'Etat based its decision on the special risk the institution posed for those in the neighbourhood. This was followed in *Banque Populaire de Strasbourg*, in which three prisoners robbed

⁸⁶ CE Ass. 24 June 1949, *Lecomte*, no. 87335, Leb. 307.

⁸⁷ CE Ass. 24 June 1949, *Daramy*, no. 90163, Leb. 308. These days the liability for most such policing activities lies with the ordinary courts where exactly the same principles apply: Cass. 1re civ. *Consorts Pourcel c Pénier et Agent judiciaire du Trésor public*, JCP 1986.II.20683 rapport Sargos.

⁸⁸ 22nd ed. (2019), p. 967.

⁸⁹ CE Ass. 26 October 1973, *Sadoudi*, no. 81977, RDP 1974, 936.

⁹⁰ See note 62.

⁹¹ CE Sect. 3 February 1956, Leb. 49; D. 1956, 596 note Auby; C. J. Hamson, 'Escaping Borstal Boys' [1969] C.L.J. 273, at pp. 279–80.

a bank a significant distance from their prisons.⁹² One prisoner was on leave but had failed to return. A second was on a special regime of semi-liberty, working out of prison during the day, but returning at night. The third was on parole. The scheme of penalties was established in the public interest, but it caused a special risk for third parties and so the bank was able to recover its losses without proof of fault.

In the case of other children in the care of public authorities, this used to be based on fault, not on risk. In 1990, the Conseil d'Etat adopted the idea of a presumption of fault. In *Ingremeau*, a seven-year-old child placed by a local authority with foster parents was playing in a friend's garden.⁹³ He accidentally injured his friend's eye with an arrow fired from his bow. The *département* of Charente was held fully liable because it failed to show it could not have prevented the injury. But this solution soon became inconsistent with the liability in private law of those supervising children and adults lacking mental capacity. The Conseil d'Etat responded by establishing no-fault liability without any mention of the concept of risk. In *GIE Axa Courtage*, a child was under the care of a child and family institution as a result of a court order.⁹⁴ The child set fire to a building, for which the claimant insurer compensated the building owner and sought indemnification from the state. Using the same terminology as the civil courts, the Conseil held that the transfer by the judge of the power to 'organise, direct and control the life of the minor' to a public body made the state liable for the harm he caused unless the harm was caused by *force majeure* or fault of the victim. This principle has since been applied to young offenders placed under the care of an association by a public authority.

In *Garde des Sceaux c Mutuelle des instituteurs de France*, where a fire was caused by a young offender placed with the association Igloo, it was held that the state could be sued for the special risk of the policy of limited surveillance, as well as the association being liable in private law.⁹⁵ This combination of grounds of liability shows that, as in private law, this is not liability based on risk, but on social solidarity.⁹⁶

⁹² CE 29 April 1987, *Garde des Sceaux c Banque Populaire de Strasbourg*, no. 61015, RFDA 1987, 831 concl. Vigoureaux, [1987] P.L. 465.

⁹³ CE Sect. 19 October 1990, *Ingremeau*, no. 76160, AJDA 1990, 869.

⁹⁴ CE Sect. 11 February 2005, *Cie Axa Courtage*, no. 252169, RFDA 2005, 594 concl. Denys. For the similar liability of those who are not permanently resident with a public body, see CE Sect. 1 July 2016, *Société Groupama de Grand Est*, no. 375076, Leb. 310 concl. Decout-Paolini.

⁹⁵ CE Sect. 1 February 2006, no. 268147, Leb. 42 concl. Guyomar.

⁹⁶ See J. Bell, 'Tort Law and the Moral Law: Anglo-French Divergences' (2021) 80 (S1) *Cambridge Law Journal* S33 at pp. S48–S55.

The connection between risk and social solidarity was even clearer in the medical field. For example, in *Bianchi*, a patient was injected with a contrasting fluid as part of a diagnostic test.⁹⁷ He suffered a severe reaction to it, leading to tetraplegia and pains which were not responsive to pain relief. Although this was a known risk of the treatment, there was no indication that the patient was susceptible to it. The Conseil d'Etat decided that, even if no fault could be found, the state was liable. Where a medical treatment involved a known risk whose occurrence was exceptional and there was no reason to think the patient would suffer from it, the hospital is liable where the harm to the patient is directly connected with the treatment and is of extreme seriousness. The subsequent legislation on no-fault medical liability of 2002 most clearly moves this kind of situation into the category of collective responsibility.

8.5.2 Assistance to the Public Service

The earliest of the decisions on no-fault liability outside public works came in *Cames*.⁹⁸ In 1895, Cames was a worker in a munitions factory in Tarbes. He was injured by a piece of metal which flew into his left hand under the pressure of a pneumatic drill. He sued for his injuries, which made him unable to work. *Commissaire du gouvernement* Romieu based his argument in favour of no-fault liability on fairness in the relations between the state and its workers that the state should guarantee them against the special risks of their work in the public service. Although the statutory scheme for industrial injuries was adopted a few years later and there are statutory arrangements for most other public service employees,⁹⁹ this remains a basis for claims made by those assisting in the public service.¹⁰⁰ In *Cohen*, it provided compensation to the employee's children for their pain and suffering at their father's illness.¹⁰¹ It also provides a remedy for occasional or voluntary helpers of the public service. Thus, in *Commune de Saint-Priest-La-Plaine*, two men volunteered to help the mayor in setting off the fireworks at the local fête.¹⁰² They were injured by the premature explosion of the fireworks. They were able to

⁹⁷ CE Ass. 9 April 1993, no. 69336, Leb. 126 concl. Daël, AJDA 1993, 344.

⁹⁸ CE 21 June 1895, *Cames*, no. 82490, S. 1897.3.33 concl. Romieu, note Hauriou; translated by Fairgrieve, *State Liability in Tort*, p. 289.

⁹⁹ For example, art. L62 of the Code du service national.

¹⁰⁰ See a repetition of this principle in CE Ass. 4 July 2003, *Moya-Caville*, no. 21106, AJDA 2003, 1598.

¹⁰¹ See note 79.

¹⁰² CE Ass. 22 November 1946, no. 74725, Leb. 279.

recover against the commune on the basis that they were assisting in the performance of a public service. There is abundant case law applying this principle to voluntary work in the public service. Indeed, it may also apply where there is no actual public service, but where a private initiative makes up for what should have been a public service. For example, in *Commune de Batz-sur-Mer c Tesson*, there was no lifeguard on a stretch of beach for which the local commune had a duty to prevent accidents.¹⁰³ A citizen drowned trying to rescue a child who was being carried out to sea. His widow was able to recover against the commune for his death, and its lack of resources did not justify the absence of the public service which he effectively provided.

8.5.3 Equality before Public Burdens

Under the principle of equality before public burdens, the state is liable to compensate the victim of (a) a serious harm that is (b) special to him or her or to a small group and which (c) is abnormal in the sense that it exceeds what citizens generally should expect to bear as the result of the lawful action of public authorities. It is ancient. Deguerge argues that it was seen first as a principle governing taxation.¹⁰⁴ Only with the writings of Hauriou in 1896 and then Jèze in 1910 did it become articulated as a principle of state liability.¹⁰⁵ The Conseil d'Etat moved gradually to recognise the principle after the First World War, leading to the decision in *Couitéas* in 1923.¹⁰⁶ In this case, Couitéas owned large areas of land in southern Tunisia, then still a French colony, which became occupied by eight thousand nomadic tribesmen. He obtained a court order for their eviction but the military authorities refused to enforce the order on the ground that this might provoke a rebellion, a decision upheld by the government in Paris. He claimed compensation from the government and the Conseil d'Etat upheld his claim. It held that a citizen in possession of a court order had a right to rely on the assistance of public force to secure its enforcement. The government was entitled to refuse on grounds of public security, in which case the refusal imposed a burden that exceeded what a citizen should normally bear and, in that case, the state should provide compensation. There was a substantial case law applying this

¹⁰³ CE Sect. 25 September 1970, no. 73707, D. 1971, 55 concl. Morisot; see also CE Sect. 22 March 1957, *Commune de Grigny*, no. 33431, Leb. 524.

¹⁰⁴ Deguerge, *Jurisprudence et doctrine*, pp. 138–9.

¹⁰⁵ M. Hauriou, 'Les actions en indemnité contre l'Etat pour les préjudices causés par l'administration publique', RDP 1896, 51.

¹⁰⁶ CE 30 November 1923, no. 38284, D. 1923.3.59 concl. Rivet; S. 1923.3.57 note Hauriou; RDP 1924, 75 and 208 note Jèze; Deguerge, *Jurisprudence et doctrine*, pp. 140–2.

principle to the refusal of public authorities to help with the enforcement of court orders before it was enshrined in statute.¹⁰⁷

The principle has been applied to other state inaction which causes abnormal loss to an individual. This is well illustrated by two cases on the illegal blockade of Channel ports by French fishermen in late August 1980. In *Sealink U.K. Ltd.*, the fishermen had blockaded the Boulogne, preventing ferries taking passengers and vehicles between England and France at the busy end of the summer holiday period.¹⁰⁸ The length of the failure of public authorities to remove the illegal blockade (six days and then two and a half days) caused an abnormally severe loss of trade. The specific character of this trade and its timing made this a special loss exceeding the normal inconvenience suffered by all port users. By contrast, in *Société Jokelson et Handstaem*, the loss to a local forwarding firm of having to divert two ships in order to unload and of having an office inactive was not sufficiently special and serious as to justify compensation.¹⁰⁹

As in English law, there has been special statutory liability for riot damage since 1795. Article L211-10 of the Code de la sécurité intérieure provides that the state is liable for the damage caused by criminal offences committed by demonstrations or gatherings. The losses covered here can include commercial losses. For example, in *COFIROUTE* demonstrators occupy a toll bridge and let vehicles through for free, then the toll bridge company can recover for its loss of revenue.¹¹⁰ The text speaks of ‘damage and harms’ (*dégâts et dommages*) and that was interpreted widely enough to include all business harms.

Liability will lie not only for inaction, but also for the actions of public bodies. For example, in *Commune de Gavarnie*, public order rules prohibited pedestrian access along a road which had previously attracted many tourists taking excursions with donkeys or horses from the local circus.¹¹¹ Although there was no fault, the commune was held liable to the owner of a tourist souvenir shop on that road which the tourists would no longer frequent. Equally in *Lavaud*, the public housing body for Lyon decided to close ten tower blocks after disturbances in the area.¹¹² The Conseil d’Etat held that it

¹⁰⁷ Now art. L153-1 of the Code des procédures civiles d’exécution. See also CC decision 98–403 DC of 29 July 1998, Rec. 276 upholding the right of the state to refuse its assistance.

¹⁰⁸ CE 22 June 1984, no. 53630, Leb. 246; also CE 30 September 2019, *Compagnie méridionale de navigation*, no. 416615.

¹⁰⁹ CE 22 June 1984, no. 53924, Leb. 247.

¹¹⁰ See CE Ass. (*avis*) 6 April 1990, *Compagnie financière et industrielle des autoroutes (COFIROUTE)*, no. 112497, Leb. 95 concl. Hubert.

¹¹¹ CE Sect. 22 February 1963, *Commune de Gavarnie*, no. 50438, Leb. 113.

¹¹² CE Sect. 31 March 1995, *Lavaud*, no. 137573, Leb. 155 concl. Bonichot.

was obliged to pay compensation to a pharmacist whose clientele had been very substantially reduced as a result of the closure.

The liability of the state will even lie for harm caused by legislative acts. In 1838, it had been decided that the state was immune from suit for losses imposed by legislation.¹¹³ This was justified on the ground that legislation was a sovereign act. But in *La Fleurette*, a Law of 1934 banned the use of the word ‘cream’ for any product not entirely sourced from milk.¹¹⁴ As a result, the claimant company had to cease production of a product sold under the label ‘Gradine’, which posed no danger to public health. Although the law did not make provision for compensation, the Conseil d’Etat concluded that there was no evidence that the legislator intended to impose an abnormal sacrifice on people in the claimant’s position. Accordingly, it ordered that this burden, imposed in the public interest, should be borne by the state.

The key to this case law is the intention of the legislator. If the legislator intends effects on private individuals, as established through the *travaux préparatoires* preceding the law, that will not give rise to liability unless the Conseil constitutionnel strikes down the legislative provision. Many pieces of legislation passed in the public interest, such as to protect endangered species, may have effects on particular individuals which the legislator fails to think about and for which it is appropriate therefore to compensate for abnormal and special losses in the administrative courts.¹¹⁵ This liability for the effects of lawful legislation applies also to the effects of treaties. For example, in *Ministre des affaires étrangères c Burgat*,¹¹⁶ landlords who tried to evict a tenant after the expiry of notice and for non-payment of rent were met with a claim of diplomatic immunity under the UNESCO treaty signed with France in 1954 on the part of her partner who had joined her after the tenancy began. The landlords successfully sued the state for compensation for this abnormal and special consequence of a lawful treaty.

In 2019, the Conseil d’Etat declared as a principle that the state was liable for the effects of unconstitutional statutes. Since the procedure of the *question préalable de constitutionnalité* was introduced in 2010, it has been possible for the Conseil constitutionnel to declare an enacted law unconstitutional. The effect of such a decision is typically to make the law inapplicable to the

¹¹³ CE 11 January 1838, *Duchâtellier*, no. 13059, Leb. 16.

¹¹⁴ CE 14 January 1938, *S.A. des Produits Laitiers ‘La Fleurette’*, no. 51704, D. 1938.3.41 concl. Roujou, note Rolland.

¹¹⁵ See, for example, CE Sect. 30 July 2003, *Association pour le développement de l’aquaculture en région Centre*, no. 215957, RFDA 2004, 114 concl. Lamy, note Bon, where protecting cormorants would have deleterious effects on fish farming.

¹¹⁶ CE Sect. 29 October 1976, no. 94218, RDP 1977, 213 concl. Massot.

claimant. That obviously raises the question of compensation for losses sustained by the implementation of that law. In two decisions, the Assemblée of the Conseil d'Etat declared that the state could be liable not only for the abnormal losses caused by valid laws, but also for any losses caused by unconstitutional laws.

By reason of the requirements of the hierarchy of norms, [state liability can be required] to compensate for the totality of harms which result from the application of a law breaching the Constitution or the international agreements of France.

It stated that such a liability only arises if the Conseil constitutionnel specifically declares the relevant provisions of the law unconstitutional and does not let their effects subsist in such a way as to maintain the validity of the effects for which the claimant seeks compensation. In addition, the claimant has to prove causation. In both the cases in which this principle was declared, the claimants failed to demonstrate that their losses were the direct effect of unconstitutional provisions of a law. In *Paris Eiffel Suffren*, an *ordonnance* of 1986 authorised a decree to specify the rules by which employees of privatised public enterprises would be entitled to a share of company profits.¹¹⁷ In 2013, the Conseil constitutionnel ruled that these provisions of the law were unconstitutional to the extent that they delegated the determination to the relevant rules to a decree.¹¹⁸ In 2011, the Cour de cassation had ruled that the Paris Eiffel Suffren company had failed to comply with the *ordonnance* (and its subsequent statutory re-enactments) and ordered it to pay more than €2 million to its employees covering the period 1986 to 1999. Having complied with that judgment, the company sued the state for the cost of applying an invalid law. The claim failed. The ruling of the Conseil constitutionnel did not find that the requirement for companies to make such payments to their employees was against fundamental rights, but it was unconstitutional only on the procedural ground that the rule should have been made in a law and not in a decree, a defect the legislator corrected in 2004. The only direct loss was the lost opportunity of building up a reserve for such a liability before it became validly required in 2004 (a claim the claimant did not present). This decision

¹¹⁷ CE Ass. 24 December 2019, no. 425983 and similarly CE Ass. 24 December 2019, *Société Paris Clichy*, no. 425981, AJDA 2020, 509. In the third case, no. 428162 *Laillat*, a claim of a worker for compensation was rejected in relation to litigation for a claim to a share in profits of an applicable company that was pending at the moment of CC decision and was then stopped. The approach of the Conseil d'Etat in these cases was upheld by the Conseil constitutionnel in CC decision no. 2019-828/829 QPC of 28 February 2020, AJDA 2020, 1307.

¹¹⁸ CC decision no. 2013-336 QPC of 1 August 2013, Rec. 918.

applied the restrictive principles on causation discussed in Section 8.4.5 in relation to illegal administrative decisions.

This case law on liability for unconstitutional legislation follows the line adopted in relation to legislation which breached the European Convention on Human Rights. In *Gardedieu*, a decree establishing a pension contribution for dentists was declared illegal by the Conseil d'Etat and the legislator passed a law validating the provisions of that decree except for judicial decisions which had already been handed down.¹¹⁹ The claimant's challenge to the validity of the state's claim for pension contribution against him was pending when the validation law was passed. The Conseil d'Etat did not consider that a sufficiently serious public interest justified denying the claimant his right to a fair trial and he was able to reclaim the pension contributions he had made. In *Société Métropole Télévision (M6)*, breaches of general principles of European Union law were held to be included within 'international agreements of France', thereby providing a basis for *Francovich* liability.¹²⁰ That decision was interesting in that it rejected liability based on fault, but retained liability for the unlawful effects of laws. In all three decisions, a distinction was made between the narrow ground for compensation under equality before public burdens and the wider ground for laws in breach of the Constitution or of a treaty. Though some have seen liability for breach of the Constitution or treaty as fault, the Conseil d'Etat has never said this explicitly. The *rapporteur public* Sirinelli described the liability in *Paris Eiffel Suffren* as 'a regime of fault which does not dare to speak its name'.¹²¹ Essentially, the judge does not like to say that the sovereign legislator has committed a fault! She prefers '*manquement*' to '*faute*' as the latter has a moral and negative connotation. But since this is strict liability in the sense that illegality is automatically fault, then the line between fault and no-fault liability is not great.

8.5.4 Other No-Fault Compensation

In addition to the general principles of no-fault liability, there are a number of statutory schemes. Some are general in nature. For example, the scheme to compensate the victims of compulsory vaccination was first set up in 1964 and is now part of the Code of Public Health (Code de la santé publique), art. L3111-9. The scheme is run by the Office national d'indemnisation des

¹¹⁹ CE Ass. 8 February 2007, no. 279522, Leb. 78 concl. Derepas.

¹²⁰ CE 22 October 2014, no. 361464, AJDA 2014, 2433.

¹²¹ See Chronique Malverti et Beaufile, AJDA 2020, at p. 514.

accidents médicaux (ONIAM) and it undertakes the medical assessment of a claimant.

In 2002 legislation was passed to unify the substantive law governing liability for private and public health care.¹²² Generally, the legislation provided that doctors, dental surgeons, midwives and ‘any establishment, service or bodies in which individual acts of prevention, diagnosis or care take place are liable for the harmful consequences of acts of prevention, diagnosis or care only in the case of fault’.¹²³ Two important exceptions were made for liability in respect of the supply of defective products (owing to the impact of the EU Product Liability Directive) and in respect of hospital-acquired infections or the intervention of medical practitioners in exceptional circumstances, where liability was imposed on the hospital or other institution unless they show *cause étrangère* (i.e. *force majeure*).¹²⁴ These liability provisions were coupled with an obligation on all those providing medical services, whether private or public, to insure against their liability, with the exception of the state itself.¹²⁵ It also set up a special fund, based on national solidarity, to compensate those suffering very serious harm as a result of contracting a hospital-acquired infection or a medical accident where liability was not established.¹²⁶ The law made the significant changes to the procedure for compensation. The medical institution has to provide the victim (or relatives) with an explanation of harm within fourteen days of its discovery. The matter is then referred to the regional Conciliation and Compensation Commission which will determine responsibility and compensation. If fault is established, then the insurer of the hospital or professional is required to make an offer of compensation. The idea was to avoid litigation. In practice, there is still a significant amount of litigation now against the compensation agency ONIAM in the administrative courts for rejecting claims of victims, rather than suing for doctors and private hospitals for fault under the Civil Code or suing public hospitals under administrative law principles.

Subsequent health problems resulting from particular drugs have also given rise to compensation schemes – for example, in the case of Mediator (the brand name for benfluorex, a treatment for diabetes, also used for diet, which led in 2021 to the pharmaceutical firm being criminally sanctioned for

¹²² Loi no. 2002–303 of 4 March 2002; see S. Taylor, ‘The Development of Medical Liability and Accident Compensation in France’, in E. Hondius, ed., *The Development of Medical Liability* (Cambridge: Cambridge University Press, 2010), pp. 93–8.

¹²³ Art. L1142–1 al. 1 1° C. santé pub.

¹²⁴ Art. L1142–1 al. 1 2° C. santé pub.

¹²⁵ Art. L1142–2 C. santé pub.

¹²⁶ Art. L. 1142–1 al. II C. santé pub.

forgery), legislation provided for full indemnity and prevented conflicts of interests in the drug sector,¹²⁷ and in the case of Dépakine, a drug for epilepsy and bipolar disorder.¹²⁸

In these areas, the principle of national solidarity is explicitly invoked. The complexity of making appropriate administrative arrangements to handle claims and ensuring the budget to pay makes this a better area for legislative intervention than for judicial expansion of general public law principles of liability, even if the first steps in many of the areas have been made by the administrative courts.¹²⁹

8.6 CONTROLS ON LIABILITY

Although the scope of liability in French administrative law is very wide, this does not necessarily result in greater recovery for citizens against the state than in other countries. As Fairgrieve pointed out, rather than limit liability through the framework of duties, controls are effected, especially through causation and rules on the measure of damages.

8.6.1 Categories of Harm

Because French law does not have special rules on liability for different types of loss – economic, emotional or ecological loss – there are, in principle, no limits on the harm for which recovery is possible. Indeed, a number of the cases mentioned in this chapter have been examples of such harms. For example, many of the cases just discussed under equality before public burdens relate to economic loss – the loss of the ability to sell a product (*La Fleurette*), the payment of pension contributions (*Gardedieu*), the distribution of profits to employees (*Paris Eiffel Suffren*). In relation to *faute lourde*, *Kechichian* is an example of recovery for economic loss. An example of recovery for economic loss in the case of ordinary fault (*faute simple*) would be *Driancourt*. Damages can be substantial. In *Nice Hélicoptères*, based on incorrect facts about the ability of the company to comply with the requirements of control over helicopters, the Ministry of Transport unlawfully refused to renew a licence to operate helicopters.¹³⁰ This led to the collapse of the business, for which the company was awarded 10 million F. It was also

¹²⁷ *Loi* no. 2011–900 of 29 July 2011.

¹²⁸ *Loi* no. 2016–1917 of 29 December 2016.

¹²⁹ See J.-M. Pontier, ‘La notion de la réparation intégrale’, *AJDA* 2018, at p. 853.

¹³⁰ CE 24 March 1995, no. 129415.

awarded 50,000 F for the unlawful interception and grounding of flights by the police.

For a long time, the administrative courts refused damages for non-pecuniary loss. But in *Letisserand*, a man and his seven-year-old son were killed when their motorbike collided with a lorry belonging to a public authority.¹³¹ The father of the man recovered 1,000 F as a *pretium doloris* and the man's widow recovered for the emotional effects of losing her young son as a then more established category of *troubles dans l'existence de la vie* (disturbance in her way of life). This second category is frequently used to provide non-pecuniary damages. Particularly in medical cases, the Conseil d'Etat has since expanded categories of recoverable loss to include anxiety at a potential illness resulting from medicine a patient had taken¹³² or breaches of human dignity arising from detention in unacceptable prison conditions.¹³³ Such *préjudice moral* is recoverable in liability for fault and liability without fault.

In recent years, the legislator has encouraged the recognition of ecological harm, harm to the environment. In private law, this was achieved through an amendment to the Civil Code (art. 1246). Administrative law followed suit through case law, influenced also by the Charter on the Environment and the Conseil constitutionnel.¹³⁴ This was accepted by an administrative court of first instance in 2021¹³⁵ at the request of associations and was preceded by a 2020 case where the Conseil d'Etat, at the request of a city under sea level, asked the government to prove it has done enough against climate change.¹³⁶

8.6.2 Causation

As in French private law, in French administrative law the scope of liability is kept in check not by limiting categories of loss, as in English law, but by the doctrine of causation. Unlike German scholars and judges, French scholars and courts do not pay attention much to theories of causation. Causation is a matter of fact for the lower court judges, and the Conseil d'Etat these days is merely the review court (*juge de cassation*). The Conseil will only interfere where the lower court has clearly misinterpreted the facts. For causation to be established, the claimant must show that his or her loss is the *direct and certain*

¹³¹ CE Ass. 24 November 1961, *Epoux Letisserand*, no. 48841, Leb. 661.

¹³² CE 9 November 2016, *Mme Bindjouli*, no. 393108, Leb. 496 concl. Lessi.

¹³³ CE Sect. 3 December 2018, *Bermond*, no. 412010, AJDA 2019, 279.

¹³⁴ CC decision no. 2011-116 QPC of 8 April 2011, Rec. 183.

¹³⁵ TA Paris, 3 February 2021, no. 1904968, para. 10.

¹³⁶ CE 19 November 2020, *Commune de Grande-Synthe*, no. 427301.

consequence of the action of the administration. In part, this will be established by the expert's report, but the final assessment of the facts is for the judge, and that is more a matter of intuition than logic.¹³⁷ The concept of 'certainty' is used to restrict the amounts recovered for loss of profits.

In cases of unlawful acts, then it has already been noted in Section 8.4.5 that errors in procedure or failure to follow formalities may not be held to have a sufficient causal connection between the unlawfulness and the harm suffered by the victim. As the Assemblée of the Conseil d'Etat pointed out in *Napol*, where the same decision could have been taken validly on the basis of facts known at the time, then there is no direct connection between the unlawful decision and the loss.¹³⁸ The loss would have happened in any case. A similar approach was adopted in *Paris Eiffel Suffren* in relation to unconstitutional laws.¹³⁹ In that case, the ground of unconstitutionality was a failure of the legislature to make the rule itself, rather than delegating the task to the executive. The procedural irregularity was not the cause of the loss. On such matters, the law on liability is consistent with the provisions of the Law of 17 May 2011, which only allows a decision to be quashed for a procedural irregularity where it would have affected the decision taken.¹⁴⁰ Causation is the basis for denying liability in such cases.

Causation is harder to establish in the case of omissions, especially omissions in supervision.

There is no liability where the public authority is able to show an alternative cause, either *force majeure* or act of the victim. *Force majeure* or act of nature was shown in the *Syndicat intercommunale* case.¹⁴¹ Although the repair to dykes and failures of dredging the river caused loss to the claimants, most of the loss was due to natural flooding after heavy rain.

The act of a third party will also exonerate the public body if it breaks the causal link in whole or in part. For example, in *Kechichian*, although the state was held liable for the gross fault of the Commission Bancaire, the loss to the claimant had principally resulted from fraud committed by the directors of the bank in which it had invested and which the Commission had failed to supervise.¹⁴²

¹³⁷ See Fairgrieve, *State Liability in Tort*, p. 170 and references. And see also note 64.

¹³⁸ See note 62.

¹³⁹ See note 116.

¹⁴⁰ *Loi* 2011-525 of 17 May 2011, art. 70 and CE Ass. 23 December 2011, *Danthony*, no. 335033, RFDA 2012, 284. See Chapter 7, note 14.

¹⁴¹ See note 19.

¹⁴² See note 71.

The act of the victim is often a proximate cause of loss. For example, in one case, a mayor in Réunion designated a particular stretch of beach as unsafe for bathing. The claimant was a long-standing resident and an experienced surfer.¹⁴³ He was injured by a shark attack in the waters close to that area of the beach. Although the claimant argued that the mayor had provided an inadequate warning of the dangers of sharks, the lower court had concluded that the claimant knew the area and it was his lack of care for his own safety that caused his injuries.

A way of avoiding questions of causation is for the claimant to seek compensation for loss of a chance.¹⁴⁴ In such a case, the amount awarded is generally related to the probability that the outcome would have been different, rather than as a contribution to the loss actually suffered. In *Centre hospitalier de Vienne*, a patient presented himself at a hospital with a post-operative problem in his eye.¹⁴⁵ Because of incorrect treatment, he lost the use of the eye. The lower court found that, if he had been treated correctly, he might have saved his sight. The loss of the chance was estimated at 30 per cent and so the claimant recovered that proportion of the harm caused by the loss of his sight. All the same, the loss of a chance must still be direct and certain, so that a serious probability is required. Loss of a chance is not the way to evade dealing with doubts. In the case of damages for loss of a chance to win a public procurement contract or a contract, the likelihood of winning the award had the illegality occurred is not correlated to the amount awarded. If the claimant had a high chance to get the contract, he will be fully compensated for his loss, as we will see in Chapter 9.

8.6.3 *Measure of Damages*

The basic principle of French law is the full recompense for all losses (*réparation intégrale*).¹⁴⁶ As a result, there is no ceiling on the amount of damages, as there would be in a lump-sum system. All the same, the full compensation principle may lead in some cases to a lump sum, rather than to regular payments. The determination of the amount is inevitably difficult. Fairgrieve is among a number of authors who point out that the compensation recovered through French state liability is often lower than comparable cases in England.¹⁴⁷

¹⁴³ CE 22 November 2019, no. 422655, AJDA 2020, 1867.

¹⁴⁴ See Fairgrieve, *State Liability in Tort*, pp. 205–10.

¹⁴⁵ CE Sect. 21 December 2007, *Centre hospitalier de Vienne*, no. 329328, AJDA 2008, 135.

¹⁴⁶ See generally J.-M. Pontier, 'La notion de la réparation intégrale', AJDA 2018, 848.

¹⁴⁷ Fairgrieve, *State Liability in Tort*, pp. 222–4.

In the case of personal injury, the administrative courts follow closely the heads of damage recognised in private law, the Dintilhac categories (named after a Cour de cassation judge), which are included in the Code of Social Security. The court assesses the full range of harms the victim has suffered and assigns them to appropriate categories (medical expenses, loss of capacity, loss of salary, effect on future employment, etc.). It then becomes possible to make deductions for social security and other payments received under these headings in order to avoid overcompensation.¹⁴⁸ The close following of social security and private law ensures a greater consistency of approach than before when Fairgrieve was writing in 2003.¹⁴⁹ That said, the Conseil retains the possibility of extending the scope of recovery in new areas, such as problems of anxiety about potential future illness or death.¹⁵⁰

Fairgrieve notes that it is often the case that financial loss is assessed with great strictness.¹⁵¹ He notes in particular the low percentage of turnover used to estimate loss of profits resulting from the refusal of planning permission. The *Gestas* case shows a very low payment for the delay in a court dealing with his civil service employment claim (€14,000 for a delay of more than fifteen years).¹⁵²

Fairgrieve also notes that amounts awarded in the French courts are often less than those awarded by the ombudsman in England for similar harms – for example, the failure of a public authority to provide educational support.¹⁵³ But this is very difficult to substantiate on a significant basis of comparable facts.

In the past, for example, in *Letisserand*, amounts for non-pecuniary loss were much lower than those in the civil courts. It is true that the willingness to preserve public funds as long as the risk of public inaction in case of damages' threat may drag the courts to adopt a restrictive approach of financial compensation. But it is now considered that the administrative courts award sums in line with those in civil courts.¹⁵⁴ All the same, there are questions about whether the amounts are appropriate, especially where no comparison can be

¹⁴⁸ See CE *avis* 4 June 2007, *Lagier, Consorts Guigon*, nos. 303422, 304214, AJDA 2007, 1800.

¹⁴⁹ See Pontier, 'La notion de la réparation intégrale', AJDA 2018, at p. 850.

¹⁵⁰ See *Mme Bindjoui*, note 131.

¹⁵¹ Fairgrieve, *Strict Liability in Tort*, pp. 198–201.

¹⁵² See note 65.

¹⁵³ Fairgrieve, *Strict Liability in Tort*, pp. 197–200 and 247–8. It is difficult to have exact comparisons, but the differences may not be that great. Compare two cases on failure to provide education support to children with special needs: Local Government Ombudsman, *Isle of Wight Council* (no. 08001991 of 12 June 2009) awarding £17,000 with CAA Paris, 11 June 2007, no. 06PA01579, awarding €33,000.

¹⁵⁴ See *Grands Arrêts*, p. 504.

made with private liability – for example, €3,000 for the detention of a person in inhumane prison conditions over four years.¹⁵⁵

Because state liability is often funded by insurance companies or special funds, they are typically subrogated to the rights of the successful claimant.

8.7 CONCLUSION

The trend in the French law of state liability over the past 150 years since *Blanco* has been to diminish very significantly state immunity, both in terms of its absolute refusal of liability and in the limitation of liability to gross fault. Although state liability is not based on the Civil Code, the two systems tend to work in tandem. The *rapporteurs publics* frequently refer to private law as a benchmark, especially in the measure of damages. But the two still work on parallel lines. The notion of *faute de service* makes it easier to invoke an objective character of fault, especially in that the state will not seek recourse to an indemnity from the wrongdoing official, unless there is also a *faute personnelle*. But the ubiquity of insurance has reduced the difference with private law over the past forty years. All the same, fault is a more expansive concept in public law, covering the failure to meet expectations, rather than just the interference with an individual's protected rights and interests. It is in the area of no-fault liability that the biggest difference lies. In both public and private law, the notion of risk has diminished in importance and the ideas of social solidarity have increased. In private law, parents are now liable strictly for their children and associations are liable for the acts of handicapped adults whose lives they organise and control. The rationale for this is that they take responsibility for people under their charge without necessary benefit to them. But it is rare to expect private individuals to take on themselves burdens for the whole community. The no-fault liability of the state for burdens falling on particular individuals which benefit the community has a more intuitive appeal in relation to the state. This was long established in relation to expropriation, billeting of troops and riot damage, and has become increasingly important in relation to policing actions in relation to strikers, squatters and demonstrators. It is in the area of ill health that the line between judicial intervention and legislative intervention has been most blurred. In cases such as *Epoux V* or *Bianchi*, the administrative courts have leapt in to provide a remedy for unfortunate victims, but the legislator has subsequently provided

¹⁵⁵ H. Belrhali-Bernard, 'La responsabilité administrative au service de la protection des droits de l'homme', in Martial Mathieu, ed., *Droits naturels et droits de l'homme* (Grenoble, 2010), 359, at pp. 377–8.

a more structured and efficient solution. In both cases, the philosophical basis of intervention is national solidarity as proclaimed in the Preamble to the 1946 Constitution.

Inevitably the European dimension has been of some importance. It has undoubtedly led to liability for unlawful legislative acts. But the narrow scope for liability of the state under art. 340 of the Treaty on the Functioning of the European Union has not been the model the French have followed. Their approach is more generous. The existence of rights under the European Convention has encouraged expansion of the areas in which the state is liable, such as for prisoners and security and policing forces.¹⁵⁶ But on the whole most of the trends have been influenced by internal trains of thought within France. Public opinion encouraged by the media has given rise to demands for compensation, and that has had some influence on the judges.¹⁵⁷

¹⁵⁶ See Belrhali-Bernard, note 154.

¹⁵⁷ See Pontier, 'La notion de la réparation intégrale'.